Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-283

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Petitioners,

v.

DONALD MATTHEWS, MORTIMER COVERT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioners, Frederick Bitzer, Chairman of the State Employees' Retirement Commission, Robert I. Berdon, Treasurer of the State of Connecticut and Nathan G. Agostinelli, Comptroller of the State of Connecticut, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 2, 1975.

OPINION BELOW

The opinion of the District Court of September 16, 1974 is reported in 390 F. Supp. 278 (D. Conn. 1974), and also appears in the Appendix hereto.

[redacted]. The opinion of the Court of Appeals, not yet reported, also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 2, 1975 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the eleventh Amendment to the Constitution of the United States of America prohibit the award of attorneys' fees against the Defendants, Chairman of the State Employees' Retirement Commission, Treasurer of the State and Comptroller of the State, since these fees are to be paid out of the State Treasury?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by the Citizens of another state or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

The Connecticut State Employees' Retirement Act grants to women employees having 25 or more years of state service the right to retire with pension rights five years earlier than men with identical service qualifications; so that women may retire at age 50, while men are not permitted to retire until age 55. The Retirement Act also contains provisions described as discriminatory rate differentials which favor female employees over male employees, who have worked less than 25 years. These laws authorize reduced retirement benefits to

employees who separate from state employment before they are normally eligible to retire, based upon the aforesaid preferred age differentials.

This suit was instituted as a class action in behalf of all "male" state employees or former state employees who were members of the Connecticut State Employees' Retirement system. The suit not only asserted equal protection claims under the Fourteenth Amendment to the Constitution of the United States, but also asserted statutory violations under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The plaintiffs sought both declaratory and injunctive relief. A three-judge court was convened to hear the case pursuant to 28 U.S.C. §§ 2281 and 2284. On October 15, 1973, plaintiffs amended their complaint to add a count alleging that the Retirement Act violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, et seq. Title VII originally did not apply to state governments, but had been amended effective March 24, 1972 to include the state governments within its scope. The case was then remanded to Chief Judge Clarie, sitting as a single district judge for resolution of the claims pursuant to 28 U.S.C. § 2281. Judge Clarie determined that the State Employees' Retirement Act violates Title VII insofar as it discriminates in favor of women in the computation of retirement benefits. The defendants did not appeal from the District Court's ruling that the Retirement Act violates Title VII. Neither did the defendants appeal from the order which prohibited future payments from the Retirement Fund or from other state monies under the Retirement System in a manner which would discriminate against men on the basis of sex. The plaintiffs had also sought to have the retirement benefits for all living retired male employees recalculated retroactively and had also claimed attorneys' fees and costs. Chief Judge Clarie held that the Eleventh Amendment to the Constitution of the United States barred a retroactive money judgment that would be paid by state funds. He also declined to grant

attorneys' fees and costs. The plaintiffs appealed from Judge Clarie's ruling. The United States Court of Appeals for the Second Circuit upheld Chief Judge Clarie's rulings that the district court could not grant retroactive damages against the State of Connecticut, but that the district court could grant prospective injunctive relief against state officers. The Court of Appeals differed with Chief Judge Clarie's ruling on attorneys' fees and remanded "the case to the district court for the purpose of determining in its sound discretion whether an award of attorneys' fees is appropriate and, if so, the amount that may reasonably be awarded."

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The United States Court of Appeals for the Second Circuit in deciding the case now before you stated that in *Class* v. *Norton* 505 F.2d 123 (2d Cir. 1974) it had held that the assessment of costs and attorneys fees was merely a permissible ancillary effect on the State Treasury and that this was necessary in order to invoke the Court's power to enjoin the future illegal conduct. The Court stated that its decision was to adhere to *Class* and specifically stated that it decined to join the Third, Fifth and Sixth Circuits in denying the payment of attorney's fees as being prohibited by the Eleventh Amendment.

The United States Court of Appeals for the Sixth Circuit in *Jordan* v. *Gilligan*, 500 F.2d 701, 705 stated:

> ". . . This cause, insofar as the award of attorneys' fees is concerned although nominally against the chief executive and other officials of the State of Ohio, in substance and effect was against the State. Any award of attorneys' fees whether against the State of Ohio or its

officials, vitally affects the rights and interests of the state in preserving its revenues. According to the general rule 'a suit is against the sovereign if the judgment sought would expend itself on the public treasury . . .' *Land* v. *Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947) . . . *Dugan* v. *Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 1963; accord *Dawkins* v. *Craig*, 483 F.2d 1191 (4th Cir. 1973). And as this Court stated in *Harrison Construction Co.* v. *Ohio Turnpike Com'n.* 272 F.2d 337, 340 (6th Cir. 1959), 'When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' . . ."

"Stripped of distracting shadow questions, the case before us presents a singular, although by no means simple issue:

Does a federal court have the power to award attorneys' fees against a state or its officials acting in their official capacities in a suit brought under 42 U.S.C.§1983 to vindicate constitutional rights? To this inquiry we must respond in the negative."

The same court in *Taylor* v. *Perini*, 503 F2d 899 again affirmed the principle that the award of attorney fees by a federal court against the state or state officials is barred by the Eleventh Amendment.

The United States Court of Appeals for the Fifth Circuit also differs with the determination of the Second Circuit. In *Named Individual Members of the San Antonio Conservation Society, et al* v. *Texas Highway Department*, 496 F.2d 10017, 1026 (1974) declared:

"The state defendants respond that sovereign immunity of the State of Texas by virtue of the Eleventh Amend-

> ment to the Constitution has also immunized them from an award of attorneys' fees. The recent case of *Edelman* v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, decided by the Supreme Court on March 25, 1974 is cited by the state defendants in support of this contention. It is apparent that any award for attorneys' fees must be paid from the general revenues of the State of Texas. Under the *Edelman* rationale 'the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the State Treasury is barred by the Eleventh Amendment.' *Edelman*, supra, 415 U.S. at 663, 94 S.Ct. at 1356. Cases in which attorneys' fees were awarded because of bad faith or obdurate obstinacy or under the private attorney general theory against non-state defendants are clearly inapposite. The claim for attorneys' fees, even if limited to services through the first appeal of this case, is, therefore barred."

The United States Court of Appeals for the Third Circuit has also joined the Fifth and Sixth Circuits in upholding the immunity granted state governments by the Eleventh Amendment to the Constitution of the United States of America. The Third Circuit in *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501, F.2d 31 held that an award for attorneys' fees could not be recovered against individual defendants, who were in positions where they exercised such discretionary governmental functions as to entitle them to official immunity.

The necessity that the Supreme Court grant this writ is pointed up by the fact that both the Second Circuit and the Sixth Circuit cite *Edelman* as their authority for arriving at opposite conclusions.

The Supreme Court has indicated at least on two occasions that it does not look with favor upon the awarding of

attorneys' fees where such fees will be paid out of state treasuries. *Commonwealth of Massachusetts Board of Retirement* v. *Murgai*, Dkt. No. 74-1120 and *Alyeska Pipeline Service Co.* v. *The Wilderness Society, et al*, 43 L.W. 4561, 4570, where the Court stated, "Nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private attorney general approach when such judicial rule will operate only against private parties and not against the Government."

In footnote No. 44 the Court further clarified its position by stating:

> "Although an award against the United States is foreclosed by 28 U.S.C.§2412 in the absence of other statutory authorization, an award against a state government would raise a question with respect to its permissibility under the Eleventh Amendment, a question on which the lower courts are divided. Compare *Souza* v. *Travisono*, ____ F.2d____(CA1 1975); *Class* v. *Norton*, 505 F.2d 123 (CA2 1974); *Jordan* v. *Fusari*, 496 F.2d 646 (CA2 1974); *Gates* v. *Collier*, 489 F.2d 298 (CA5 1973), petition for rehearing en banc granted, 500 F.2d 1382 (CA5 1974); *Brandenburger* v. *Thompson*, 494 F.2d 885 (CA9 1974); *Sims* v. *Amos*, 340 F.Supp. 691 (MD Ala.), aff'd. summarily, 409 U.S.942 (1972); with *Jordan* v. *Gilligan*, 500 F.24 701 (CA6 1974); *Taylor* v. *Perini*, 503 F.2d 899 (CA6 1974); *Named Individual Members* v. *Texas Highway Dept.*, 496 F.2d 1017 (CA5 1974); *Skehan* v. *Trustees of Bloomsberg State College*, 501 F.2d 31 (CA3 1974). In this case, the Court of Appeals did not rely upon the Eleventh Amendment in declining to award fees against Alaska, see n. 16, *supra*, and therefore we have no occasion to address this question."

CONCLUSION

These conflicts justify the grant of certiorari to review the judgment below.

Respectfully submitted,

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August 11, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Petitioners,

v.

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GARLAND M. FITZPATRICK, SAUL STEIN, WILLIAM SLOCUM, THOMAS H. ELLIOTT, DONALD MATHEWS & MORTIMER COVERT

v.

J. FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, & NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut

Civil No. 15,492

MEMORANDUM OF DECISION

This suit was brought as a class action by the named plaintiffs, in behalf of all "male" state employees or former state empoyees, who were members of the State Employees' Retirement System, under Chapter 66 of the Connecticut General Statutes. It not only asserted equal protection claims under the Fourteenth Amendment to the Federal Constitution, but also statutory violations under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The plaintiffs request the Court to grant both declaratory and injunctive relief against the Chairman of the State Employees' Retirement Commission, the State Treasurer and the State Comptroller, to prevent their alleged continued administration of what is claimed to be unlawful sexually discriminatory retirement provisions of the Connecticut State Employees' Retirement Act and more particularly § 5-162, § 5-163, and § 5-166 of the Connecticut General Statutes.

Jurisdiction of this suit exists under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, 2202, and 2281; and the action is specifically authorized under Title VII of the Civil Rights Act,

as amended, 42 U.S.C. § 2000e-5(f)(3). Since injunctive relief restraining the enforcement of certain state statutes was requested, a three-judge constitutional court was convened, under 28 U.S.C. §§ 2281 and 2284. A hearing on the merits, scheduled before the three-judge court on April 27, 1973, was postponed at the request of plaintiffs' counsel, because at that time the General Assembly was reported to be favorably considering legislation, which would make this case moot. The plaintiffs thereafter amended their complaint on October 15, 1973, by adding a second count, alleging that the State Retirement Act, on its face and as applied, violates Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and more specifically Public Law No. 92-261, effective March 24, 1972. The plaintiffs also represented that this state law clearly violates the interpretive guidelines relating to pension fringe benefits as promulgated under 29 C.F.R. 1604.9 and 37 C.F.R. 6835[1] by the Equal Employment Opportunities Commission, revised April 5, 1972.

The State Employees' Retirement Act grants to women employees having 25 or more years of state service, the right to retire with pension rights five years earlier than men with identical service qualifications; so that women may retire at age 50, while men are not permitted to retire until five years later, at age 55. The Act also contains provisions described as discriminatory rate differentials in favor of female employees over male employees, who have worked less than 25 years in the state service. These laws authorize reduced retirement benefits to employees, who separate from state employment before they are normally eligible to retire, based upon the aforesaid preferred age differentials.

After a full hearing on the merits, the Court finds that the State Employees' Retirement Act does violate Title VII of the Civil Rights Act of 1964, as amended, and the regulations appurtenant thereto, in that it invidiously discriminates

in favor of women over men, as to the number of years of service eligibility and the computation of retirement benefits. The Court accordingly grants judgment for the plaintiffs on their prayer for equitable relief.

SUBJECT BACKGROUND

This suit is sponsored by the Connecticut State Employees' Association, a non-profit organization, whose purpose primarily is to protect and promote the interests of all state employees. The parties stipulated in writing that the Association and its membership have approved the bringing of this action and that its news publication has in the past, and will in the future, apprise its members of its progress. They have also agreed that it is a true class action, and that the male plaintiffs are not in any way different from, unique, or not representative of other similarly situated male state employees, insofar as their retirement benefits and those of comparably situated female state employees are concerned.[2]

The State Employees' Association itself agreed to pay the court costs required for the bringing of this action, while the Connecticut Civil Liberties Union agreed to assume the responsibility for providing cooperating legal counsel at no expense to the plaintiffs. All of the plaintiffs are *male* state employees; four of them are currently employed and two are retired. Both of the aforesaid employee categories are comprised of participating members in the Connecticut State Employees' Retirement Fund. Three of the active employees have worked more than 25 years and desire to retire before reaching 55 years of age; the fourth has served more than 10 years, but less than 25 years and wishes to retire in the near future.

The plaintiffs' complaint as originally drawn, attacked the constitutionality of several sections of the State Retirement Act and requested that their enforcement be enjoined,

insofar as the statutes related to the disparate treatment of retirement provisions and premised these claims on alleged violations of equal protection rights under the Federal Constitution. The Federal Equal Employment Opportunity Act was amended by Public Law No. 92-261, 86 Stat. 103, on March 24, 1972, so as to encompass state and local governments under its definition of the terms, "person, employer and employee," 42 U.S.C. § 2000e(a),(b), and (f). This change made it encumbent upon state and local governments to immediately reappraise their employment practices, to be certain that they conformed with the amended federal law and its supporting regulations. After the commencement of this action on December 11, 1972, the plaintiffs, in January, 1973, filed a class complaint with the Boston Regional Office of the Equal Employment Opportunity Commission of discrimination charges against the Connecticut State Employees' Retirement Commission. On September 14, 1973, that office issued to the plaintiffs a right to sue letter as the latter had requested. The Equal Employment Opportunity Act amendment made it obvious to the three-judge court, that the application of the new law might well prove dispositive of the issues. For that reason, the Court remanded the case to the single district judge who convened it, so that he might consider the applicability of federal statutory law and thus dispose of the case on those grounds, without reaching the constitutional issues. It is now a well established principle of law that even "a three-judge court . . . [is] obliged to adjudicate [a] statutory claim in preference to deciding the original constitutional claim . . . ." *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970); *see* also *Wyman* v. *Rothstein*, 398 U.S. 275 (1970); *King* v. *Smith*, 392 U.S. 309 (1968), and *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965).

Written stipulations of fact were executed by counsel; the first was filed November 30, 1973, and the supplement was filed February 6, 1974. Procedurally, counsel agreed

therein that the amendment which added the second count, filed March 29, 1974,

> "(a) . . . be treated as valid when originally filed or may be revalidated as of the date of the filing of this stipulation, (b) that it is not necessary for plaintiffs to file a new amendment at this time or commence a new civil action, and (c) that the Amendment already on file should be considered the civil action commenced by said plaintiffs, as authorized by the Attorney General in such letter [right to sue letter] of January 16, 1974."[3]

The plaintiffs' complaint alleged that the following provisions of the State Retirement Act constituted an invidious discrimination against male employees:

(a) Connecticut General Statute § 5-162, and more particularly:

> "(i) Subsection (c)(1) which provides for the retirement of a member with 25 or more years of state service on or after the member's fifty-fifth birthday, if a man, or fiftieth birthday, if a woman."
>
> "(ii) Subsection (d)(1) which provides for the retirement of a member with less than 25 years of state service if he meets the following conditions:
>
> "(A) The member is a woman who has completed five years of state service and reached her sixty-fifth birthday;
>
> "(B) The member is a woman who has completed ten years of state service and reached her fifty-fifth birthday;
>
> "(C) The member is a man who has completed ten years of state service and reached his sixtieth birthday;'

and subsection (d)(3) in which retirement income is computed on the basis of a table based on age and sex under which in effect a man must be five years older than a woman to receive equivalent benefits.

"(b) Connecticut General Statutes 5-163 on early retirement, especially subsection 3, wherein a member 'after he has completed twenty-five years of state service but before he has reached his fifty-fifth birthday, if a man, or her fiftieth birthday, if a woman, shall be entitled to a retirement income.'"

"(c) Connecticut General Statute 5-166(a) which provides that a member who leaves state service before becoming eligible for retirement shall, under certain conditions, be eligible for retirement income on a reduced actuarial basis 'provided, if such member is a woman she shall be eligible upon reaching her fiftieth birthday and if a man, he shall be eligible upon reaching his fifty-fifth birthday."

The plaintiffs' complaint alleged that the foregoing provisions of state law, on their face and as applied by the defendants, violate Title VII of the Civil Rights Act of 1964, as amended, and the regulations adopted pursuant thereto, because they discriminate between men and women in regard to fringe benefits of employment.[4] They also represented that these provisions violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the Federal Civil Rights Act of 1871, because they discriminate on the basis of sex as a condition or privilege of employment, so as to deprive the plaintiffs and those similarly situated of their rights, privileges, and immunities secured under said Constitution.

STATUTORY HISTORY

Counsel for both parties have failed to bring to the Court's attention, any legislative history which might more fully explain the reasons why the General Assembly wrote into law this retirement age priority for the benefit of women. However, the Court is mindful that many private pension systems at that time contained similar provisions, which gave a preferred status to female employees. Historically, this is understandable when we read an 1872 decision of the United States Supreme Court, which considered women to have been ordained bythe Creator to be the more dependent of the sexes and entitled to be sheltered from the rebuffs of life. That decision concluded that the State of Illinois in refusing to grant a license to a woman to practice law, had violated no provision of the Federal Constitution and explained its reasoning as follows:

> "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . .
>
> "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell* v. *The State*, (Illinois), 83 U.S. (16 Wall.) 130, 141 (Dec. 1872).

That protective era has now passed. A new order prevails today where men and women stand side by side in the work force, performing like skills as equals in all occupational endeavors. It is only right that both sexes should be treated as equals in sharing the benefits of their productive efforts towards a better life.

The historical record of the present legislative act reveals that H.B. No. 117, was signed into law on May 8, 1919, and provided in relevant part:

> "*Any person* who shall have been in the service of the State thirty years and shall have reached the age of sixty-five years, or any person who has served in any department of the State twenty-five or more years in the aggregate and has reached the age of seventy, may be retired by the board of control, and thereafter shall receive a salary equal to one-half his average salary for the five years next preceding such retirement . . . ."

It is of special interest to note that the first State Retirement Act provided for no preferred status, to any employee because of his or her gender; the granting of retirement was not then regarded as a right to be demanded by the employee, but a matter of discretion which rested solely with the State, and determined by the Board of Finance and Control. The term "employee" was classified as being "any person" and this description was carried throughout the 1930 revision, as provided in Conn. Gen. Stat. § 170.

It was not until 1939 that the amended law, § 67(e), introduced the preferred retirement status for women. It provided in relevant part as follows:

> ". . . or being a female person, having reached the age of fifty, or being a male person, having reached the age of fifty-five . . . ."

> "*Any person* in the service of the state in an appointive position covered by this part, who, being a female person shall reach the age of sixty-five years, or being a male person shall reach the age of seventy years, shall be retired . . . ."

This disparate treatment of eligibility for retirement was first built into the law in the 1939 Session and continues down to the present; it is more particularly embodied in the specific statutes now being challenged, Conn. Gen. Stat. §§ 5-162, 5-163, and 5-166.

An exception to the foregoing age retirement rules, applies to state policemen and correctional institution guards and instructors, who are permitted to retire on their own application or that of their Commissioner after 20 years of service and upon reaching their forty-seventh birthday. It is also of interest to note that § 29-3 defines the term policeman to include policewoman; so that there exists no age disparity under the retirement laws affecting members of the State Police Department.

Statistical Facts Relevant to Plaintiffs' Status

The parties have stipulated that as of July 31, 1973, the relevant factual findings pertaining to the administration of the state retirement laws as they apply to the plainiffs are as follows:

Plaintiff	Age	State Employment	Total Qualifying time for benefits	Normal Ret. Date or Rate	Normal Ret. Date if Woman
Fitzpatrick	53	9- 1-49 to date	29 yrs. 4 mos.	2-1-75	2-1-70
Stein	54	4-16-41	32 yrs. 3 mos.	8-1-73	8-1-68
Slocum	51	11-17-41	31 yrs. 8 mos.	11-1-76	11-1-71

Plaintiff	Age	State Employment	Total Qualifying time for benefits	Normal Ret. Date or Rate	Normal Ret. Date if Woman
Elliot	52	Army Service 12- 7-41- 6-19-42 5-12-49- 7-26-50 1- 3-61 to date	14 yrs. 4 mos.	5-1-84	5-1-81
Mathews	67	4-15-47- 10-31-71	24 yrs. 8 mos.	923.10 monthly	935.63
Covert	64	6-14-26- 9-24-26 12-20-26- 9-23-27 6- 4-28- 6-4-28- 9-21-28 3- 1-49- 7-25-50 11- 3-58- 5-31-72	monthly 305.74	328.66	16 yrs. 5 mos.

The plaintiffs, Fitzpatrick, Stein, Slocum and Elliot, have expressed a desire to retire in the immediate future, but find they are ineligible to do so. However, if each were a female, he would have been eligible to have retired at age 50, at the following respective monthly benefits: $1,149.53; $1,043.27; $483.70, and $171.50.

The *normal retirement* rate schedule for *males* is when the benefit rate is 2% or more; 25 years or more of service at age 55; 10 years, but less than 25 at age 65; 5 years but less than 10 at age 70. In comparison, the normal retirement age for a woman is when the benefit rate is 2% or more; 25 years or more of service at age 50; 10 years and less than 25 years at age 60; 5 years, but less than 10 at age 65.

The benefit rate schedule for early retirement provides monthly benefits equal to 1/12 of rate, multiplied by the years of service, times the average of the three highest years of earnings. The variant in the male and female retirement is ex-

pressed in the rate table prescribed in § 5-162(d)(3) of the Connecticut General Statutes. That rate is determined by the years of service and the employee's age at retirement and is more specifically portrayed in the booklet "Connecticut State Employees' Retirement System, January 1972," attached to the filed stipulation as an appendix.

The monthly benefits calculated for each of the plaintiff-employees already retired, disclose a variance in monthly retirement benefits on the basis of sex. The benefits of the plaintiff Mathews are computed in the following manner: 1/12 (.02 x 24-8/12 x $22,455.30) equaling a monthly payment of $923.10; whereas, a comparable female employee's benefits would be computed by the formula: 1/12 (.025 x 20 x $22,455.30) amounting to a monthly retirement benefit of $935.63. Similarly, the plaintiff Covert's calculation of monthly benefits would be: 1/12 (.0186 x 16-5/12 years x $12,013.36) amounting to monthly benefits of $305.74; whereas, a comparable female employee's benefits would be 1/12 (.02 x 16-5/12 years x $12,013.36) amounting to a monthly payment of $328.66. The parties have agreed that retirement benefits under the State Retirement Act may be properly described as "fringe benefits" within the meaning of Title VII of the Federal Civil Rights Act of 1964 and the EEOC Code of Regulations.

Claims of the Parties

The plaintiffs direct their claims against the challenged state laws on federal statutory grounds aided by the supporting power of the most recent amendment to Title VII of the Equal Employment Opportunity Act, Public Law No. 92-261, effective March 24, 1972. Title 42 U.S.C. § 2000e defines an employer as a "person" engaged in an industry affecting commerce, who employs fifteen or more employees for a minimal stated period of time; and it defines the term "person" to in-

clude "state governments, governmental agencies, (and) political subdivisions." Thus, all state employees have now been brought by Congress under the protection of 42 U.S.C. § 2000e(2)(a). That federal law now makes it an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." Title 42 U.S.C. § 2000e-5(f)(1) authorizes any aggrieved person to bring an action against his employer, if his grievance has not been resolved within 180 days after he has filed his complaint with the Equal Employment Opportunity Commission. The parties stipulated that all of the statutory prerequisites have been fully complied with here, so that the issues are properly before the Court. The secondary attack on discriminatory sex classifications in the state's retirement laws, addresses itself to the claim that these differences are unreasonable and arbitrary and do not have any fair or meaningful relation to the object of the legislation.

The defendants have baldly denied that the retirement laws impose any invidious discrimination on the basis of sex, so as to deprive the plaintiffs or those identifiable with their class, of equal protection under the federal constitution or the provisions of the Equal Employment Opportunity Act. 42 U.S.C. § 2000e-2(a)(2). They also assert that this suit is in reality a suit against the State of Connecticut and as such is barred by the Eleventh Amendment to the Federal Constitution. On the discrimination issue, the Attorney General has argued that it is common knowledge, that women as a class, earn less than men; and that employment in governmental agencies, generally pays less than similar positions in private industry. He suggests that when the General Assembly originally established the retirement plan, it offered these preferred inducements to women, so that they would seek state employment, even though the wages were less than those

paid in the private sector. The defendants would justify their position on this issue based upon the holding of the Second Circuit in *Gruenwald* v. *Gardner,* 390 F.2d 591, 592 (2d Cir. 1968), *cert denied sub nom Gruenwald* v. *Cohen,* 393 U.S. 982 (1968). In that case, the Court approved as being constitutional, a disparity in the computation of federal social security retirement benefits, where men and women had equal earnings, but based its finding upon the recognized differences in the attributes of men and women. The defendants claim that case determined not only the constitutional validity of the defendants' present posture, but that dicta supported the proposition that the State was not violating the Civil Rights Act of 1964. The case clearly held that different treatment for women, as a class, was constitutionally permissible, so long as the discrimination was not patently arbitrary and was reasonably related to its subject and societal interests.

Discussion of Law

There exists no threshold jurisdictional barrier to the Court's disposition of this case. While it is now a commonly accepted principle that the Eleventh Amendment to the Constitution will bar a suit for money damages in federal court against an unconsenting state, jurisdiction was recognized in *Ex parte Young,* 209 U.S. 123 (1908), to enjoin the acts of state officials, when they were sued individually and the complaint alleged that they were acting unconstitutionally or contrary to a federal law. Certainly, any determination that a state statute is void for obstructing a federal statute rests on the Supremacy Clause of the Federal Constitution.[5]

This principle has been reaffirmed in *Scheuer* v. *Rhodes,* 42 U.S.L.W. 4543 (U.S. April 17, 1974) when the Court said:

> "The Eleventh Amendment to the Constitution of the United States provides: 'The judicial power of the United

> States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by citizens of another State . . . .' It is well established that the Amendment bars suit not only against the State when it is the named party but when it is the party in fact." . . . .
>
> . . . .
>
> "However, since *Ex parte Young [supra]* it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." 42 U.S.L.W. at 4544-45.

Congress proclaimed by law on March 24, 1972, that the federal right to equal opportunity in employment should be extended to include employees working for state and local governments. 42 U.S.C. § 2000e-2. State governments were charged with the duty to reformulate their thinking in this area and to avoid committing "unlawful employment practices," if such existed.

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States." *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 284 (1974).

Under subchapter VI, § 2000e, *Definitions,* the law defines the statutory terms as follows:

> "(a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions . . . ."

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

. . . .

"(f) The term 'employee' means an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. *The exemption set forth in th preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*" (emphasis added).

Clearly, the law requires that all state employees, except those specifically exempted (such as those elected to public office or their personal or policy staff of advisers) are subject to and protected by the discrimination prohibitions of the federal law.[6]

Section 2000e-2 provides:

"(a) It shall be an unlawful employment practice for an employer —

. . . .

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."

Supportive of the foregoing amendment, the Equal Employment Opportunities Commission on April 5, 1972, revised its "Guidelines on Discrimination Because of Sex" which provide in relevant part:

"Fringe Benefits:

(a) 'Fringe benefits,' as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

• • • •

(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits, that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which differentiates in benefits on the basis of sex." 29 C.F.R. 1604.9 (1972).

The Court is required to look with great deference to these administrative interpretive guidelines established by the very agency charged with administering this law.

"The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines in-

terpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. See, *e.g. United States* v. *City of Chicago*, 400 U.S. 8 (1970); *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Power Reactor Co.* v. *Electricians*, 367 U.S. 396 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971).

The amended federal statute and these supporting guideline regulations make it obvious to the Court, that the Connecticut State Employees' Retirement Act treats men and women according to different benefit standards, in determining their retirement age and pension benefits. The Connecticut plan as presently written, strikes at the very principle, which the federal law prohibits, the disparate treatment of men and women employees, because of their gender.

. . . .

The Seventh Circuit Court of Appeals defined its interpretation of this law without equivocation, when it said:

". . . we read Title VII to include retirement plans as 'conditions of employment' just as they are similarly viewed under the National Labor Relations Act. *Inland Steel Co.* v. *N.L.R.B.* (170 F.2d 247, 7 Cir. 1948, *cert. den.* 336 U.S. 960, 69 S.Ct. 887, 93 L.Ed. 112). Title VII forbids any discrimination with respect to such conditions of employment. Furthermore, the Act proscribes classifications by employees '. . . which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .' Section 703(a)(2) [42 U.S.C. § 2000e-2(a)(2)]." *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1189 (7th Cir. 1971).

The same interpretation of Title VII was followed in *Ugiansky* v. *Flynn and Emrich Company*, 337 F.Supp. 807, 810 (D. Md. 1972) where the Court said:

> "This court believes that pension plans, absent a specific exclusion in the Act, are or may be part of the 'compensation, terms, conditions, or privileges' of employment and therefore covered by Title VII, 42 U.S.C. § 2000e-2(a)(1)."

The Supreme Court had outlawed discrimination as to sex as an overall practice when it decided *Philips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1970) and stated that under the Civil Rights Act of 1964, persons of like qualifications must be given employment opportunities irrespective of their sex.

A plain reading of the present statute teaches us that retirement plans which treat men and women differently with respect to their ages of retirement are prohibited. The Fifth Circuit Court of Appeals unanimously confirmed this principle in *Peters* v. *Missouri-Pacific Railroad Co.*, 483 F.2d 490, 492 n.3, (5th Cir. 1973) (en banc).

> "We entertain no doubt that Congress intended Title VII to reach retirement plans as conditions of employment, just as such plans are viewed as employment conditions under the National Labor Relations Act . . .
>
> "Retirement plans establishing different ages for retirement of male and female employees of one employer violate Title VII."

In a similar vein, the Seventh Circuit said:

> "The scope of Section 703(a)(1) is not confined to explicit discriminations based 'solely' on sex. In for-

> bidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." . . . . *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). (footnote omitted).

The Connecticut retirement plan constitutes an unlawful employment practice, because it discriminates between men and women with regard to employment fringe benefits and is therefore found by the Court to be illegal and in violation of federal statutory law.

Remedies

The complaint asks that the Court, in addition to granting injunctive relief against continued prospective violations of the law, should assess money damages retroactively to July 2, 1965, when Title VII of the Civil Rights Act became law. An alternative proposal would award retroactive benefits to January 25, 1971, a date two years prior to the January 25, 1973 date when the plaintiffs first filed their complaint with the Equal Employment Opportunities Commission. They argue that they are entitled to the enforcement of the two-year back pay statute of limitations, 42 U.S.C. § 2000e-5(g), restricting the recovery of retroactive claims under the Act. The plaintiffs insist however, that in any event, they should at least receive benefits recalculated back to March 24, 1972, when the protective policy of the amendment as expressed in Title VII, was extended to include all employees in state government. They press their claim, that they are entitled to be reimbursed back to the time when the federal law first proclaimed as a national policy, that this type of discrimination must end; and only if the Court orders such restitution with their past benefits recomputed, can all victimized male employees be made financially whole.

The plaintiffs have also asked that this Court allow them a sum for reasonable attorneys' fees, under 42 U.S.C. § 2000e-5(k). They agree that the Court's granting of such a request is solely discretionary. The plaintiffs' counsel argues that this litigation is of sufficient public importance to justify the granting of such fees as part of the court costs to the prevailing party.

The total hours of legal preparation as a cooperating attorney for the American Civil Liberties Union amounted to 137.5 hours. A portion of this, 84.9 hours ($4,245.00) is attributable to the work of Attorney Orth, the chief counsel; 22.6 hours to his associate, Attorney Carey ($1,130.00); and 30 hours to a second associate, Attorney Priestly ($900.00). The affidavit submitted by the plaintiffs asserts that the reasonable charges for the legal services of the principals in his firm is billed at the rate of $50 per hour, while that of the associates is $30 per hour. The Court finds that while the counsel fees requested are fair and reasonable in amount, they are not allowable as a recoverable expense against the State.

Law Re: Damages

The State Retirement Fund, § 5-156, provides for a separate trust fund into which is deposited employee contributions and state appropriations, which are held in the custody of the State Treasurer. These funded assets comprise employee contributions, varying in amount from 2% to 5% of the salary, which percentage in turn is dependent upon whether or not the employee has elected social security coverage. The Retirement Commission is entrusted with the task of determining the State's contribution as computed on an actuarial basis, to meet the current benefit services, provided that State payments shall not be less than seventy-five per cent of total retirement income payments for each fiscal

year commencing July 1, 1973. In 1972, pursuant to § 5-156(a), the General Assembly programmed a prospective forty-year amortization of unfunded past service liabilities, varying from 30% in 1971 to 100% in 1985. The major source of these funds is public funds and any deficiency must come from tax revenue. Any judicial determination of the plaintiffs' claims must recognize that any judgment, which would allow retroactive payments would have to come from the public treasury.

> ". . . [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Co.* v. *Dept. of Treasury*, 323 U.S. 459, 464 (1945).

> "Although the Eleventh Amendment is not literally applicable since petitioners who brought suit are citizens of Missouri, it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 280 (1972).

The rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944); *Kennecott Copper Corp.* v. *Tax Commissioner*, 327 U.S. 573 (1946).

The issue of recovering money damages against a state was clearly resolved in the recent case of *Edelman* v. *Jordan*, 42 U.S.L.W. 4419 (U.S. March 25, 1974) where the United States Supreme Court held that the federal court was without jurisdiction to award a retroactive money judgment, in the absence of a waiver or without the State's consent, when

such would have to be satisfied out of the general revenues of the State; and that this principle was applicable even though the award attempted to make equitable restitution of moneys previously illegally withheld. The plaintiffs here do not suggest that the State has waived the immunity provisions of the Eleventh Amendment. This amendment, therefore, still remains a jurisdictional barrier to the payment of the retroactive monetary relief requested.

In a similar application the Eleventh Amendment precludes the award of attorneys' fees. The State of Connecticut is an alter ego of the defendant Commission members and they have not waived the State's sovereign immunity defense. The award of attorneys' fees from state funds is tantamount to an award of money damages. While the amount sought in this case is not prohibitive, once the flood-gates are opened, adequate control no longer prevails. Statutory authority cannot be permitted to frustrate or pierce the Eleventh Amendment constitutional shield.

> ". . . where a state has not waived its sovereign immunity the Eleventh Amendment bars a district court from awarding attorneys' fees against it." *Jordan* v. *Gilligan*, 42 U.S.L.W. 2590 (6th Cir. April 25, 1974); *cf. Gates* v. *Collier*, 489 F.2d 298 (1973).

See also, *Jordan* v. *Fusari*, 496 F.2d 646, 651 (2nd Cir. 1974), where the Court found the State of Connecticut, in a different case, had waived the Eleventh Amendment, by its conduct in previously settling claims for back unemployment compensation benefits.

The Court finds no reason to discuss the applicability of the Equal Protection Clause of the Fourteenth Amendment, as it relates to discrimination because of sex. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); and *Frontiero* v. *Richard*, 411 U.S. 677 (1973). The federal

civil rights statute has adequately determined the issues raised.

The Court finds this to be a class action and that the plaintiffs are entitled to prospective injunctive relief from this date forward, so as to prevent the defendants and their successors from paying out moneys from the retirement fund or state moneys in respect to said fund, which discriminates against men on the basis of sex. The defendants are accordingly ordered to administer the State Employees' Retirement Act without unreasonable sex classifications unfavorable to men as they relate to retirement age and benefit computations; so that men will be eligible to retire at age 50 and receive the same treatment as similarly situated women. Nothing herein shall be construed to interfere with the State Legislature performing its constitutional function of freely determining public policy, as it pertains to deciding upon a uniform retirement age for all men and women employees of the State of Connecticut in the future, provided the same is carried out without discrimination as to age or benefits on the basis of sex.

The foregoing opinion shall constitute the findings of fact and conclusions of law required to be filed by the Court, pursuant to Rule 52(a), Fed. R. Civ. P.

The parties shall settle an appropriate order within ten (10) days. SO ORDERED.

Dated at Hartford, Connecticut, this 16th day of September, 1974.

T. EMMET CLARIE
Chief Judge

FOOTNOTES

[1]See Discussion of Law at p. 19-22.

[2]Stipulation of Facts, filed Nov. 30, 1973.

[3]Supplemental Stipulation of Facts, filed Feb. 6, 1974 (Plaintiffs' Exhibit B).

[4]42 U.S.C. § 2000e *et seq;* 29 C.F.R. § 1604.9 (1972).

[5]Article VI. Cl. 2 provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding."

> "The Constitution is as imperative in its prohibition of discrimination in state and local government employment as it is in barring discrimination in Federal jobs. The courts have consistently held that discrimination by state and local governments, including job discrimination, violates the Fourteenth Amendment and is prohibited. (footnote omitted).

. . . .

> "The Committee feels that it is an injustice to provide employees in the private sector with an administrative forum in which to redress their grievances while at the same time. denying a similar protection to the increasing number of state and local employees." House Report No. 92-238, Vol. 2, U.S. Code, Cong. and Admin. News, p. 2137 at 2153-4 (92nd Cong., 2d Sess. 1972).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 740 — September Term, 1974.

(Argued March 10, 1975 Decided June 2, 1975.)

Docket No. 74-2581

GARLAND M. FITZPATRICK, SAUL STEIN, WILLIAM SLOCUM, THOMAS H. ELLIOT, DONALD MATHEWS, and MORTIMER COVERT,

Plaintiffs,

DONALD MATTHEWS, MORTIMER COVERT,

Plaintiffs-Appellants,

— against —

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Defendants-Appellees.

Before:

MOORE, MANSFIELD and GURFEIN,

Circuit Judges.

Appeal by plaintiffs, male state employees or former state employees who were members of a retirement plan established by the Connecticut State Employees' Retirement Act, from a decision of the United State District Court for the District of Connecticut, T. Emmet Clairie, *Chief Judge,*

which enjoined enforcement of provisions of the Retirement Act found to discriminate unlawfully on the basis of sex in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, as amended, but refused to award retroactive benefits or attorneys' fees to plaintiffs on the ground that the Federal District Court was without jurisdiction to enter such an award under the Eleventh Amendment to the United States Constitution.

Reversed and remanded on the matter of attorneys' fees; in all other respects affirmed.

PAUL W. ORTH, Esq., Hartford, Conn. (Austin Carey, Jr., Esq., Hoppin, Carey & Powell, Hartford, Conn., of counsel), *for Appellants.*

SIDNEY D. GIBER, Assistant Attorney General, Hartford, Conn. (Carl R. Ajello, Attorney General of the State of Connecticut, F. Michael Ahern, Assistant Attorney General, Hartford, Conn., of counsel), *for Appellees.*

WILLIAM A. CAREY, General Counsel, Washington, D.C. (Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Charles L. Reischel, Susan J. Johnson, Attorneys, Equal Employment Opportunity Commission, Washington, D.C., of counsel), *for United States Equal Employment Opportunity Commission as Amicus Curiae.*

MANSFIELD, *Circuit Judge:*

The principal question on this appeal is whether, in a suit against a state by its employees attacking its retirement plan as discriminating on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, the Eleventh Amendment bars a federal court from granting, in addition to injunctive

relief, monetary damages and attorneys' fees. We hold that the state is shielded by Eleventh Amendment against an award of damages but not against an award of attorneys' fees that is ancillary to the permissible grant of prospective injunctive relief.

This litigation was brought by the named plaintiffs as a class action on behalf of all present and retired male employees of the State of Connecticut who were members of the State Employees' Retirement System, a retirement benefit plan established by the State Employees Retirement Act, Conn. Gen. Stat. §§ 5-152 to 5-192 ("Retirement Act" herein). Asserting equal protection claims under the Fourteenth Amendment and statutory violations under 42 U.S.C. § 1983, plaintffs sought declaratory and injunctive relief against the State Treasurer, State Comptroller, and the Chairman of the State Employees' Retirement Commission, to restrain continued enforcement by those officials of sexually discriminatory provisions of the Retirement Act. Plaintiffs objected to §§ 5-162, 5-163 and 5-166, which grant to women employees having 25 or more years of state service the right to retire with pension rights five (5) years earlier than similarly situated men, and further provide rate differentials favoring female over male employees who retire with less than 25 years of state service.

A three-judge court was convened to hear the case, 28 U.S.C. §§ 2281, 2284, but on October 15, 1973, plaintiffs amended their complaint to add a count alleging that the Retirement Act violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.* Title VII, which originally did not apply to state governments, had been amended by Public Law No. 92-261, 86 Stat. 103, effective March 24, 1972, to bring the states within its purview.[1] After the amendment of the

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[1]Section 2000e(a) of 42 U.S.C. was amended to provide that a "person" who can be an "employer" under Title VII includes "govern-

complaint, the case was remanded to Chief Judge Clarie, sitting as a single district judge, for resolution of the claims under federal statutory law, see 28 U.S.C. § 2281.[2]

After a hearing on the merits, Chief Judge Clarie, in a thorough opinion, found that retirement benefits fall within the language "compensation, terms, conditions, or privileges of employment" as used in Title VII and that such benefits are barred by Title VII from being made the subject of sex discrimination. 42 U.S.C. § 2000e-2(a)(1). He further deter-

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ments, governmental agencies [and] political subdivisions."

[2]The three-judge court, in an opinion issued on June 10, 1974, determined that the federal statutory claim was "substantial" and remanded the case. Since an action for injunctive relief against a state statute, which is based on *both* federal constitutional and non-constitutional grounds, as is the present action, must be heard and determined by a three-judge court under 28 U.S.C. § 2281, *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 76-77 (1960), until recently the propriety of this remand may have been questioned. Since *Florida Lime*, however, the Court has held that a three-judge court need not be convened in an action to enjoin a state statute solely on the ground that it conflicts with a federal statute, *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965), and that, where a properly convened three-judge court is confronted with a case presenting both constitutional and non-constitutional grounds, it should first adjudicate the non-constitutional claim, *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970); *King* v. *Smith*, 392 U.S. 309 (1968).

The *Rosado* Court suggested that in that case "the most appropriate course may well have been to remand to the single district judge for findings and determination of the statutory claim," 397 U.S. at 403, and this suggestion seems to have been firmly adopted by the Court in *Hagans* v. *Lavine*, 415 U.S. 528 (1974). In *Hagans* the district court, sitting alone, had determined the substantiality of the constitutional claims but then proceeded to consider on the merits the statutory claim without first convening a three-judge court. The Supreme Court approved this procedure, observing that if a three-judge court had been convened, "in view of what we have said in Rosado . . . [the three-judge panel] could then merely pass the statutory claim back to the single judge." 415 U.S. at 544. See also *Doe* v. *Lavine*, 347 F. Supp. 357, 359-60 (S.D.N.Y. 1972) (Gurfein, J.). The single district judge thus had power to hear the statutory claim. Since Judge Clarie granted the injunction, we do not face the problem in *Morrow* v. *Clifford*, 502 F.2d 1066 (3d Cir. 1974), criticized in 88 Harv. L. Rev. 1028 (1975), holding that the power of the single district judge in these circumstances does not extend to the *denial* of an injunction.

For the same reasons this court has jurisdiction of the present appeal, even though the statutory claim decided below might have been properly decided by the three-judge panel, see *King* v. *Smith*, *supra*, in which event the appeal would lie only to the Supreme Court, 28 U.S.C. § 1253. See *Hagans* v. *Lavine*, *supra*, 415 U.S. at 543.

mined that the Retirement Act violates Title VII insofar as it discriminates in favor of women over men in the number of years of service eligibility required for retirement and in the computation of retirement benefits. See ____ F. Supp. ____ (D. Conn. 1974). He rejected defendants' contention that this suit was in reality one against the State of Connecticut and as such barred from federal court by the Eleventh Amendment to the Constitution, since the defendants here were sued individually and the state's immunity is not shared by state officials who act unconstitutionally or contrary to federal law. *Ex Parte Young,* 209 U.S. 123 (1908); *Scheuer* v. *Rhodes,* 416 U.S. 232, 237 (1974). Defendants did not appeal from the court's determination that the Retirement Act violates Title VII, nor from the injunction against future payments from the Retirement Fund or from other state moneys under the Retirement System in a manner which would discriminate against men on the basis of sex.

The section of Title VII prescribing remedies which a court may employ against violation of that title states that, in addition to enjoining an unlawful employmen practice, the court may

> "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(q).

In addition to injunctive relief, plaintiffs also sought in their complaint an order requiring defendants to recalculate for all living retired male employees the benefits to which similarly situated female employees would have been entitled, and to pay out to the retired male employees the difference between the recalculated benefits and the benefits actually

received.[3] Costs and reasonable attorneys' fees were also demanded pursuant to 42 U.S.C. § 2000e-5(k).[4] Chief Judge Clarie, however, determined that under the Supreme Court's recent decision in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), a federal court is barred by the Eleventh Amendment, absent the state's waiver or consent, from awarding a retroactive money judgment that would be satisfied by a "payment of funds from the state treasury." 415 U.S. at 677.

On this appeal plaintiffs argue that there are several critical factors present in this case that did not confront the *Edelman* court. While we agree that *Edelman* v. *Jordan* is not in all respects controlling in this case, we believe Judge Clarie correctly resolved the Eleventh Amendment issue with respect to the back pay claim, and affirm. We reverse his holding, however, insofar as it barred the attorneys' fee claim.

DISCUSSION

The Eleventh Amendment to the Constitution states:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Adopted in 1798, the Amendment was enacted in direct response to widespread dissatisfaction with the Supreme Court's

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[3]Plaintiffs suggested several time periods which might be appropriate for the calculation of retrospective benefits. Judge Clarie did not determine which is appropriate, and in view of our holding, we also find it unnecessary to reach this question.

[4]Section 2000e-5(k) provides:

> "(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

1793 decision in *Chisholm* v. *Georgia*, 2 Dall. 419, which held that under Article III, § 2,[5] federal jurisdiction extended to a suit against the State of Georgia brought by South Carolina citizens to collect a debt owed by that state to an estate of which plaintiffs were executors.[6] Since the Amendment was intended to reverse the *Chisholm* decision,[7] it has been interpreted not literally but according to its purpose of restoring to Article III the "fundamental rule of jurisprudence" that "a state may not be sued without its consent," *Ex Parte New York*, 256 U.S. 490, 497 (1921). For instance, in fulfillment of the overall objective of protecting the sovereign immunity of the states the Court has decided that a suit for damages against a state by a citizen of the *same* state, though not specifically prohibited by the Amendment's language, is barred. *Hans* v. *Louisiana*, 134 U.S. 1 (1890). See also, e.g., *Principality of Monaco* v. *Mississippi*, 292 U.S. 313 (1934) (suits by foreign countries as well as foreign citizens barred); *Ex Parte New York, supra* (state immune from private actions in admiralty as well as "suits in law or equity").

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[5]Article III, § 2, clause 1 provides:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States;— between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[6]See 1 C. Warren, *The Supreme Court in United States History* 96 (1922). Warren observes that the surprise with which the *Chrisholm* decision was greeted is attributable to the fact that "the vesting of any such jurisdiction over the sovereign states had been expressly disclaimed and even resented by the great defenders of the Constitution, during the days of the contest over its adoption." *Id.*

[7]See Cullison, *Interpretation of the Eleventh Amendment*, 5 Houston L. Rev. 1, 6-14 (1967).

Likewise following this principle, the Supreme Court has long held that even though the state is not a named party the shield provided by the Amendment may in an appropriate case be invoked by the defendants, see, e.g., *In re Ayers*, 123 U.S. 443 (1887); *Louisiana* v. *Jumel*, 107 U.S. 711 (1882). Looking to substance rather than to form, the Court decided that immunity should not depend on "the mere names of the titular parties but . . . the essential nature and effect of the proceeding, as it appears from the entire record." *Ex Parte New York*, 256 U.S. 490, 500 (1921); see *Hagood* v. *Southern*, 117 U.S. 52, 67 (1886); *Smith* v. *Reeves*, 178 U.S. 436, 438-40 (1900). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest . . .," *Ford Motor Co.* v. *Department of the Treasury*, 323 U.S. 459, 464 (1945), and the Eleventh Amendment bars a private suit "seeking to impose a liability which must be paid from public funds in the state treasury . . .," *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974); see *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573 (1946); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944).

On the other side of the coin, the Eleventh Amendment does not bar a suit to enjoin enforcement by a state officer of an unconstitutional state statute. *Ex Parte Young*, 209 U.S. 123 (1908). The Court, in reaching this result, relied on the common law principle that a state officer acting illegally is deemed to act "without the authority of" the state and therefore outside its shield of sovereign immunity. 209 U.S. at 159-60. Furthermore, although the Eleventh Amendment shields the state against a retroactive award of monetary damages payable out of the state treasury as compensation for its past breach of a legal duty, a judgment requiring a state to expend some public funds in connection with obtaining or implementing injunctive relief against it is permissible, even though the award in such a case has "an ancillary effect on the

state treasury," *Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974); *Jordan* v. *Fusari*, 496 F.2d 646, 651 (2d Cir. 1974).

Plaintiffs here contend that the "recalculated benefits" sought by them would be paid neither by the defendants personally nor out of "public funds in the state treasury" but from the Retirement Fund[8] pursuant to Conn. Gen. Stat. § 5-156 which provides:

> "All member contributions and state appropriations shall be held in a *separate retirement fund* by the treasurer, who may invest and reinvest as much of the fund as is not required for current disbursements. . . ." (Emphasis added).

Since all retirement benefit moneys are first paid into this "separate fund," plaintiffs argue that this case does not come within the rule of *Ford Motor Co.* and *Edelman* and that the Eleventh Amendment is therefore no bar to the action. Although the defendants did not deem this argument worthy of response in their brief, the substantiality of plaintiffs' assertion has been focused by a recent District of Rhode Island decision holding that Rhode Island's state retirement fund was unprotected by the state's Eleventh Amendment shield. *Bowen* v. *Hackett*, ____ F. Supp. ____ (D.R.I. Jan. 16, 1975), Civ. Nos. 5038 and 5043.

In determining whether a separate state agency or institution shares the Eleventh Amendment shield as an "alter ego" of the state, a court must look to numerous factors, no one of which is conclusive, see *Krisel* v. *Duran*, 258 F. Supp. 845, 848-49 (S.D.N.Y. 1966) (Weinfeld, *J.*), *affd. per curiam*,

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[8]Plaintiffs have apparently changed their view of the source of the award of back benefits. Their amended complaint simply sought an award from "the retirement fund *and/or state moneys*." (Emphasis added).

386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968); *Zeidner* v. *Wulforst*, 197 F. Supp. 23 (E.D.N.Y. 1961); cf. *State Highway Comm'n* v. *Utah Const. Co.*, 278 U.S. 194, 199 (1929). The most important, of course, is whether, in the event plaintiff prevails, judgment will have to be paid out of the state treasury. *Whitten* v. *State University Const. Fund*, 493 F.2d 177, 180 (1st Cir. 1974) (Moore, *J.*); *Gordenstein* v. *University of Delaware*, 381 F. Supp. 718, 721 (D. Del. 1974); *Bowen* v. *Hackett*, *supra*; *Krisel* v. *Duran*, *supra*, 258 F. Supp. at 849; see *Edelman* v. *Jordan*, *supra*, 415 U.S. at 663. Also to be considered is whether the entity sued is performing a governmental or proprietary function, whether it has been separately incorporated, whether it has the power to sue and be sued and enter into contracts, the degree of autonomy over its operations, and whether the state has immunized itself from responsibility for the agency's operations. See *Whitten* v. *State University Const. Fund*, *supra*, 493 F.2d at 179-80; *Gordenstein* v. *University of Delaware*, *supra*; *Krisel* v. *Duran*, *supra*.[9]

In concluding in *Bowen* v. *Hackett* that the Rhode Island retirement fund was not an "alter ego" of the state, the court found that the fund was created solely from the contributions of employees and that the state had no legal duty to replenish the fund if it should become depleted or pay a judgment against the fund. Here the situation is vastly different. Regardless of whether Connecticut would be liable for a judgment against the Retirement Fund, the state is required to appropriate funds on an actuarial basis, the amount being determined each year, and to pay *at least* 75% of the total retirement income payments for each year. Conn. Gen. Stat.

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[9]Determination of the scope of the Eleventh Amendment shield is a matter of federal law, *Matherson* v. *Long Island State Park Comm'n*, 442 F.2d 566, 568 (2d Cir. 1971), but state law must be analyzed to determine the status of the sued entity in the government structure of the state, *Skehan* v. *Board of Trustees*, 501 F.2d 31, 41 (3d Cir. 1974).

§5-156a. A judgment against the fund would thus automatically increase the obligations of the general state treasury[10] and amount to a judgment against the state. Furthermore, the Connecticut Retirement Fund has none of the indicia of independence from the state, such as separate incorporation or a power to sue in its own name. It is controlled by the state treasurer, see Conn. Gen. Stat. §5-156. Although the money in it may be used only for a designated purpose, it nonetheless remains "public money." *Whitten* v. *State University Const. Fund, supra; Bowen* v. *Hackett, supra; cf. Kennecott Copper Corp.* v. *State Dep't of Taxation*, 327 U.S. 573 (1946) (tax payments held in separate fund.)

Plaintiffs' argument thus boils down to an assertion that the effect on the general public treasury is permissibly indirect because the state treasury will not feel the pinch until the time comes for the next annual appropriation to the fund. However, this view would distort the meaning of the term "ancillary" as used by the Court in *Edelman* and would have the effect of sharply curtailing, if not emasculating, the concept of a "suit against the state." Accordingly, we hold that the action here, insofar as it seeks damages, is in essence against the state and as such is subject to the Eleventh Amendment.[11]

Plaintiffs' major contention is that, even assuming that the action is properly characterized as one against the state which would normally entitle the state to invoke its Eleventh Amendment immunity, the state here has waived that immunity and in effect consented to suit. Although barriers to

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[10]Conn. Gen. Stat. § 5-156 provides that the legislature "shall appropriate" to the retirement fund the amount needed to maintain actuarially required levels.

[11]Although not controlling, another persuasive factor in reaching this conclusion is that Connecticut law treats money in the retirement fund as "public money." *Dowe* v. *Egan*, 133 Conn. 112, 48 A.2d 735 (1946).

federal court jurisdiction normally may not be "waived" by the parties, *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 384 (1884), it has been long held that a state may consent to a suit that would otherwise be barred by the Eleventh Amendment, see, e.g., *Clark* v. *Barnard*, 108 U.S. 436 (1883), since the purpose of the Amendment is merely to limit federal jurisdiction to those suits to which a state has not consented.

Plaintiffs do not suggest that consent to their suit was expressly or directly given by the State of Connecticut. Rather they argue that waiver or consent may be inferred from certain action taken by the state itself, and that in any event Congress was vested by the Fourteenth Amendment to modify Connecticut's immunity in civil rights suits.

First it is argued that Connecticut waived its immunity by its own enactment of certain laws. Plaintiffs rely on Article II, clause 4 of the state Constitution which provides, "Claims against the state shall be resolved in such manner as may be provided by law." It is sufficient that the Connecticut state courts, albeit in the context of a different type of claim, have determined that this section does not waive sovereign immunity, *Fidelity Bank* v. *State of Connecticut*, 35 Conn. L.J. No. 39 (March 26, 1974). But even if Connecticut allowed suit against it in the context of a claim for damages due to discrimination, it is settled that a state may "give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts . . .," *Smith* v. *Reeves*, 178 U.S. 436, 445 (1900).[12] In-

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[12]The *Smith* v. *Reeves* Court noted that the state's power to limit its consent is:

> "subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent

deed unless a "clear indication" to submit to suit in federal as well as state court can be found, a federal court cannot read the state's consent to be sued in its own courts as embracing federal jurisdiction. *Great Northern Life Ins. Co.* v. *Read*, 332 U.S. 47, 54 (1944); *Knight* v. *State of New York*, 443 F.2d 415, 419 (2d Cir. 1971) (Friendly, *J.*). Here, there is not the slightest indication of intent to submit to federal suit.

For the same reasons plaintiffs' citation of various provisions of the Connecticut Constitution and statutes prohibiting discrimination in that state is of no avail. See, e.g., Conn. Const. Art. I, §20, Conn. Gen Stat. §§4-61c to 4-61j. Even if these sections authorized a damage action for discrimination against the state, no possible inference could be drawn that the state had also consented to a similar action in federal court. *Great Northern Life, supra; Knight* v. *State of New York, supra.*

Before reaching the more troublesome question of whether Connecticut has waived its immunity by engaging in activity subject to Congressional regulation under the Fourteenth Amendment, we must first determine whether Title VII as amended has authorized a private action for damages against the state. If it has not, that would be the end of the matter, since in the absence of Congressional authorization plaintiffs would be out of court. Serious doubts are raised as to existence of such authority by the Supreme Court's recent decision in *Employees* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), where it faced a similar problem under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 200, *et seq.* In 1966 the FLSA, which regulates the working conditions of those producing goods for commerce,

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may be reviewed or reexamined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States." 178 U.S. at 445.

was amended to bring within its scope state-operated hospitals and the employees thereof, see Pub. L. 89-601, 80 Stat. 830-32, 837 (Sept. 23, 1966). Prior thereto states had been excluded from the Act. Section 16(b) of FLSA, 29 U.S.C. § 216(b), which authorized a private action against an employer for amounts of unpaid minimum wages or overtime compensation in "any court of competent jurisdiction," remained unchanged by the 1966 Amendments. The Court held that although Missouri was covered by the "literal" language of the FLSA and subject to its substantive provisions, *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), Congress had not sufficiently indicated an intention to sweep away Missouri's immunity from private suit. In reaching this conclusion the Court relied upon several circumstances: Congress' failure to change the remedial provisions of § 16(b) in amending the Act; the harshness of the monetary penalties provided by the Act in addition to recovery of actual damages; and the Act's provision for its enforcement by the Secretary of Labor in federal court and apparently by any party in state court. 411 U.S. at 285-86. The Court concluded that the "delicate federal-state relationship" was preserved under the Act by remitting private parties to federal court relief only through the Secretary of Labor. *Id.*

The amendments to Title VII, like those to the FLSA, merely changed the definition of "employer" to include the states,[13] and did not specifically deal with the question of a state's immunity from suit. Nor does Title VII's legislative history reveal a specific intention to lift that immunity. However, it is evident that the 1972 amendments to Title VII, unlike the amendments to the FLSA reviewed by the court in *Employees*, did contemplate private actions against state governments or their agencies. Title 42 U.S.C. § 2000e-5(f)(1),

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[13]See note 1 *supra*.

the relevant portion of which is set out in the margin,[14] spells out the manner in which a civil action may be brought after a complaint is filed with the Commission. Actions against a "government, governmental agency or political subdivision"

may be prosecuted in the first instance only by the Attorney General, but aggrieved employees may intervene in such an action. If the Attorney General does not commence the action or enter into a conciliation agreement within 180 days, the aggrieved employees may commence a private suit against the government or governmental agency within 90 days thereafter. By providing these special procedures for suits involving governments, Congress here demonstrated an intention to make available in some cases private suits against governments. That *state* employees were to be put on a par

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[14] "(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

with all other employees is evidenced by statements in both the House and Senate Reports accompanying the 1972 amendments to the effect that all state and local government employees were to have access to the remedies available under the Act.[15] Thus, unlike the situation in *Employees*, Congress intended to authorize a private suit for backpay by state employees against the state. To suggest otherwise would be to hold Congress to a degree of legislative specificity it could not and does not customarily meet. See *Employees* v. *Department of Public Health & Welfare*, 411 U.S. at 289-90 (Marshall, *J.*, concurring).

Although we must conclude that Congress authorized private damage suits against the states for violation of Title VII, we reject any suggestion that an inference of voluntary waiver or consent may be drawn from the state's mere continuance of its governmental function of hiring employees to perform state duties and of providing for their working conditions, including retirements. It is obvious that Connecticut, which had engaged in these activities as an essential part of

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[15]The House Report of the 1972 Act notes:

> "Few of [the many state and local government] employees are afforded the protection of an effective forum to assure equal employment. The bill amends section 701 of the Civil Rights Act of 1964 . . . . to include State and local governments, governmental agencies and political subdivisions within the definition of 'employer' under Title VII. *All State and local government employees would under the bill have access to the remedies available under the Act.*" House Rep. No. 92-238 (92d Cong., 1st Sess. 1971), 1972 U.S. Code Cong. & Admin. News at 2152 (emphasis added).

Similarly, the Senate Report stated:

> "The Committee believes that employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private industry section of the economy.
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> ". . . By amending the present section 701 to include state and local governmental units within the definition of an 'employer' under Title VII, all State and local governmental employees would, under the provisions of the bill, have access to the remedies under the Act." Senate Rep. No. 92-415 (92d Cong., 1st Sess. 1971) in *Legislative History of the Equal Employment Opportunity Act of* 1972 at 418.

its functions long before Title VII was amended to include the states, would, regardless of the amendment, have no choice but to continue doing so thereafter or cease functioning as a state. Thus no basis exists for finding voluntary waiver. Cf. *Fay* v. *Noia*, 372 U.S. 391, 439 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). See Note, Private Suits Against States in Federal Courts, 33 U. Chi. L. Rev. 331, 336 (1966). Although its continued engagement in these activities might conceivably be labelled a "constructive" consent, the Supreme Court in *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974), stated that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."

Parden v. *Terminal Ry. Co.*, 377 U.S. 184 (1964), relied upon by plaintiffs, is clearly inapposite. There the State of Alabama, in face of the fact that interstate railroads were subject to the Federal Employees Liability Act, 45 U.S.C. §§ 51, *et seq.*, and had been subjected to extensive regulation by Congress, see *California* v. *Taylor*, 353 U.S. 553 (1957) (state-owned railroad subject to Railway Labor Act); *United States* v. *California*, 297 U.S. 175 (1936) (same subject to Federal Safety Appliance Act), undertook the operation of such a railroad, which was essentially a proprietary business. In these circumstances a finding of voluntary waiver of constitutional immunity from suit was fully justified. No such situation exists here. Connecticut's employment of its employees and adoption of a retirement system had long predated Title VII.

Plaintiffs next contend that, even assuming that Connecticut has not by its own conduct waived its Eleventh Amendment immunity or consented to suit, Congress nevertheless had the power to subject it to a private action for damages for denial of civil rights. While conceding that Congress cannot expand the scope of federal jurisdiction beyond the limits

of the Constitution, *Marbury* v. *Madison*, 1 *Cranch* 137 (1803), plaintiffs assert that Congress' power may be found in the Fourteenth Amendment, which must be deemed to have modified the Eleventh in the area of civil rights. Plaintiffs point to the history of the Fourteenth Amendment, which evolved from a dissatisfaction with the states' failure to protect the civil rights of their citizens, and to the statements of various Congressmen who objected to the post-Civil War legislation on the ground that it would impair the "sovereignty" of the States.[16] It is argued that "[i]nasmuch as the post-Civil War-amendments were, by their essential nature, inconsistent with the existence of a sovereign immunity defense, the states by ratifying those Amendments waived to a limited extent their general right not to be sued by a private citizen." We disagree.

The question is not as broad as applicants would have it. Essentially it is a narrow one, which deals more with procedure than substance, i.e., whether the particular remedy sought here, a private federal action for retroactive damages, is a constitutionally permissible method of enforcing Fourteenth Amendment rights, notwithstanding the immunity granted to the states by the Eleventh Amendment. Accepting the fact that legislation enforcing individual rights under the Fourteenth Amendment must to some extent subject states

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[16]For example, plaintiffs quote Congressman Rogers, who, opposing the 1866 Civil Rights Bill, stated:

> "I ask you to stand by the law of the country and to regulate these Federal and State systems upon the grand principles upon which they were intended to be regulated, that we may hand down to those who are to come after us this bright jewel of civil liberty unimpaired; and I say that the Congress or men who will strip the people of these rights will be handed down to perdition for allowing this bright and beautiful heritage of civil liberty embodied in the powers and sovereign jurisdiction of the States to pass away from us." Cong. Globe, 39th Cong., 1st Sess. 1122-23.

to private suits, it does not follow that Congress necessarily has power to provide the particular remedy sought here.[17]

To the extent that a tension exists between enforcement of rights under the Fourteenth and the state's immunity under the Eleventh, our duty is to reconcile and give effect to both amendments insofar as possible. See *Prout* v. *Starr*, 188 U.S. 537, 543-44 (1903). Observing that "particularly after the Civil War, Congress undertook to make federal courts the primary guardians of constitutional rights," Justice Brennan in his separate opinion in *Perez* v. *Ledesma*, 401 U.S. 82, 106 (1971), recognized that "*Ex Parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Edelman* v. *Jordan*, *supra*, must be read as reaffirming the necessity of maintaining this balance between enforcement of individual constitutional rights and protection of the state's fiscal administration under the Eleventh. See 415 U.S. at 666-69; The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 247 (1974).

This desirable balance should not be upset in the context of suits to enforce Fourteenth Amendment rights unless other

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[17]Plaintiffs argue that the

> "Civil War Amendments created precisely the circumstances in which immunity had no place, by stripping states of their hitherto existing sovereign power to sanction slavery, deny equal protection or due process of laws, or abridge the right to vote on account of race. In the limited areas prescribed by these Amendments the states have *no authority the exercise of which can be protected from litigation*, and in such cases the purpose underlying the Eleventh Amendment cannot be served." (Emphasis added).

This argument suggests that Congress has unlimited power to provide remedies to enforce the Fourteenth Amendment. But the mere fact that Congress may constitutionally apply the substantive provisions of certain legislation against the states is not inconsistent with the fact that certain remedies may not be available against the states. *Maryland* v. *Wirtz*, 392 U.S. 183, 200 (1968). See also *California* v. *Taylor*, 353 U.S. 553, 568 n.16 (1957).

means that might be made available for enforcement of rights under that Amendment are so ineffective that Congress, in promulgating the Fourteenth Amendment after its adoption by more than three-quarters of the Union, necessarily implied that the Eleventh Amendment's remedial bar to a damage action against a state must yield. There is no reason to find such a necessary implication, however, since Congress, under the balance as reaffirmed in *Edelman,* has at its disposal various methods other than private federal damage suits for enforcing Fourteenth Amendment rights.

The prospective injunctive relief available under *Ex Parte Young,* if it stood alone, should offer adequate relief as a remedy for enforcement of Fourteenth Amendment rights against the states. However, other remedies either are or may be made available. The Eleventh Amendment presents no bar to a suit by the United States against a state, *United States* v. *Mississippi,* 380 U.S. 128 (1965). Congress can authorize a suit by the federal government on a private plaintiff's behalf and it has done so in Title VII. See 42 U.S.C. § 2000e-5(f)(1). A suit by the United States against a state to recover back benefits on behalf of persons protected by a federal statute is permissible. *Brennan* v. *State of Iowa,* 494 F.2d 100, 104 (8th Cir. 1974); see *Department of Employment* v. *United States,* 385 U.S. 355 (1966).[18]

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[18]Plaintiffs' claim that *United States* v. *Mississippi* authorizes their suit because it was brought "in place of the Attorney General" must, however, be rejected. While it is true that, following the procedures outlined in 42 U.S.C. § 2000e-5(f)(1), the instant suit was first referred to the Attorney General, whose chose not to sue but issued to the plaintiffs a "right to sue" letter, it can hardly be contended the United States is responsible for the management of this suit, thus meeting the concern of the *Employees Court* for maintaining the "delicate federal-state relationship," see p. 3937, *supra.* Nor can it even be contended that the United States is the real party in interest, cf. *Standing Rock Sioux Indian Tribe* v. *Dorgan,* 505 F.2d 1135, 1140 (8th Cir. 1974). Plaintiffs seek the back benefits solely for themselves; whatever interest the public had in this lawsuit has already been served by entry of the injunction. Moreover the failure of the Attorney General to prosecute this action himself can hardly be characterized as a finding that plaintiffs' suit is of special public interest.

Furthermore, although Congress did not suggest that jurisdiction over private actions under Title VII extends to state courts,[19] it might have done so.[20] State courts would have faced no constitutional barrier to granting the retrospective damage relief Congress authorized since they are free from the limitations of the Eleventh Amendment, which restrict only federal judicial power.[21] We need not consider whether Congress could, consistently with the Tenth Amendment, compel a state to permit its citizens to enforce their Fourteenth Amendment rights against it in its courts except to note that under the Supremacy Clause and the general principle that state courts are co-equal partners with the federal courts in the enforcement of federal law, see *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279, 298 (Marshall, *J.*, concurring); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 339-40 (1816), state courts have been obligated to entertain congressionally-authorized private suits where state court jurisdiction extends to suits of the same character, see *Testa* v. *Katt*, 330 U.S. 386 (1947).[22]

Thus there is no reason in this case to depart from the balance between the Eleventh Amendment and other constitutional interests which was most recently reaffirmed in

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[19]See 42 U.S.C. § 2000e-5(f)(3).

[20]Congress has made state courts available for private federal damage actions against the states under the Fair Labor Standards Act, § 16(b), 29 U.S.C.A. § 216(b) (1975 Supp.) (as amended April 8, 1974), and the Federal Employers Liability Act, § 6, 45 U.S.C. § 56.

[21]Plaintiffs point out that the Fourteenth Amendment was passed at a low ebb of confidence in the willingness of the state courts to comply with this duty, see, e.g., *Mitchum* v. *Foster*, 407 U.S. 225, 240-42 (1972); *Monroe* v. *Pape*, 365 U.S. 167, 174-80 (1961). But even so, there is little need to assume that the duties otherwise imposed on the states would not be sufficient to remedy problems of state recalcitrance without also reading into the Fourteenth Amendment a *sub silentio* elimination of the states' Eleventh Amendment rights.

[22]Of course a state might decline to exercise such congressionally-mandated jurisdiction on grounds of soverign immunity. However, this would pose a problem distinct from the question of the scope of federal remedial power under the Eleventh Amendment.

Edelman. In any event it may not still be open to this court to accept plaintiffs' invitation to disregard the Eleventh Amendment in Fourteenth Amendment cases. While Justice Marshall's dissent in *Edelman* suggested that the Supreme Court had not decided whether the Eleventh Amendment is limited by the later enactment of the Fourteenth, 415 U.S. at 694 n.2, the majority in that case expressly overruled *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), *State Department of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918 (1972) (per curiam), and *Wyman* v. *Bowens*, 397 U.S. 49 (1970) (per curiam), all cases involving Fourteenth Amendment causes of action, insofar as those cases allowed assessment of retroactive damages against the state. 415 U.S. at 670-71. See also *Wilkerson* v. *Meskill*, 501 F.2d 297 (2d Cir. 1974), in which this court affirmed *per curiam* on the basis of *Edelman* a dismissal of plaintiff's claims to back wages from the state based on equal protection and due process, although without considering the arguments presented here. Further see *Skehan* v. *Board of Trustees*, 501 F.2d 31, 42 n.7 (3d Cir. 1974); *Burton* v. *Waller*, 502 F.2d 1261, 1273 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3474 (U.S. No. 74-875 Mar. 4, 1975).

Plaintiffs' request for costs and attorneys' fees stands on a different footing. While the district court was without jurisdiction to entertain the plaintiffs' claims for retroactive damages against the state, the court did have jurisdiction to entertain the claim for prospective injunctive relief against state officers, *Ex Parte Young*, *supra*, based on the state's failure in its duty to conform its conduct to federal law and its threatened continuation on the same illegal course in the future. In order to invoke the court's power to enjoin such future illegal conduct, it was necessary to incur costs and attorneys' fees which, as we recently held in *Class* v. *Norton*, 505 F.2d 123, 126-27 (2d Cir. 1974), may be assessed as having a permissible "ancillary effect" on the state treasury, see *Edelman* -. *Jordan*, 415 U.S. at 667-68, of a prospective order.

See *Sims* v. *Amos*, 409 U.S. 942 (1973), *aff'g*, 340 F.Supp. 693 (M.D. Ala. 1972) (three-judge court); *Souza* v. *Travisono*, No. 74-1243 (1st Cir. Mar. 11, 1975), Slip Opin. at 4-6. We adhere to *Class* and accordingly decline to join those circuits which have denied attorneys' fees, see *Skehan* v. *Board of Trustees*, 501 F.2d 31, 42 (3d Cir. 1974); *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974); *Taylor* v. *Perini*, 503 F.2d 899, 901 (6th Cir. 1974); *Named Indiv. Members of San Antonio Conservation Soc'y* v. *Texas Highway Dept.*, 496 F.2d 1017, 1026 (5th Cir. 1974).

For the foregoing reasons we remand the case to the district court for the purpose of determining in its sound discretion whether an award of attorneys' fees is appropriate and, if so, the amount that may reasonably be awarded.